

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of:)
)
Federal-State Joint Board)
On Universal Service)
)
Access Charge Reform)
)
Petitions for Reconsideration)

CC Docket No. 96-45

CC Docket No. 96-262

OPPOSITION OF MCI WORLDCOM, INC.

Petitioners seek reconsideration of various aspects of the Commission's *Remand Order* in CC Docket 96-45 implementing the decision of the United States Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*.¹ Herein, MCI WorldCom, Inc. ("MCI WorldCom") will address petitioners arguments only insofar as they would require the Commission to refund certain past contributions to the Universal Service Fund ("USF"). The Commission should not require such refunds. There is no possible win for any identifiable group of consumers. There is a near-complete overlap between intrastate and interstate ratepayers, and there is no suggestion that the funding level for USF would change. Any refunds flowed through to customers would in all probability be "funded" by those same customers.

According to BellSouth Corporation ("BellSouth"), the Fifth Circuit's finding that the

¹ *Federal State Joint Board On Universal Service*, CC Docket No. 96-45, *Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262*, FCC 99-290 (rel. Oct. 8, 1999), 64 Fed. Reg. 60,349 (Nov. 5, 1999) ("*Remand Order*"); see *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

Commission lacked jurisdiction to assess USF contributions, in part, on intrastate revenues “raises a serious unresolved question whether the Commission and the USAC have authority to retain the funds assessed for USF on intrastate revenues prior to the court’s ruling.”² BellSouth asserts that applicable precedent creates a strong presumption that appellate judicial decisions in civil cases are to apply retroactively.³ Despite the fact that undoing these past assessments “is a bit like unscrambling eggs,”⁴ BellSouth concludes that the Commission must initiate the unscrambling.

MCI WorldCom urges the Commission instead to find that retroactive application in this case would serve no useful purpose. Such application would certainly require extraordinary effort by the Commission and industry. There is no equitable way to provide refunds and ensure that those refunds are flowed through to the customers who originally paid higher charges, while at the same time not disrupting the schools and libraries and rural health care programs established by Section 254.⁵ Instead of proceeding inequitably, the Commission should simply find that even if retroactivity could be accomplished perfectly, the net impact would be insignificant for the vast majority of carriers and customers. Courts have recognized that in some

² BellSouth Petition at 2.

³ *Id.* at 8-9; citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995); *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991).

⁴ BellSouth Petition at 13.

⁵ *Id.*

circumstances it may be appropriate to depart from retroactive application.⁶ The Commission should find such circumstances in this case.

BellSouth itself illustrates well the pointlessness of retroactive application in this case. BellSouth passed its universal service contribution costs through in rates for interstate services. The vast majority of those costs were passed through in access charges to interexchange carriers (IXCs). Retroactive application of the Fifth Circuit's decision would require a significant refund to BellSouth, who would in turn pass that refund through to IXCs. Of course, to pay for the refund the Commission would likely increase the universal service assessment for some period of time. Since contributions are now based overwhelmingly on interstate revenues only, IXCs would themselves end up as the funding source of their pass-through refunds, thus completing a process that is almost entirely circular.⁷

Arya International Communications Corporation ("Arya") seeks retroactive application of the Commission's decision on remand that telecommunications providers whose interstate revenues are less than 8 percent of their combined interstate and international revenues, will not be required to contribute to the USF based on their international revenues. This claim is even weaker than BellSouth's. The Fifth Circuit found the Commission's previous decision to include international revenues for any carrier with interstate revenues, to be arbitrary and capricious, not beyond the Commission's jurisdiction. Here, it would be equally arbitrary and capricious to

⁶ See, e.g., *National Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1288 (D.C. Cir. 1995).

⁷ This process would be particularly difficult for a carrier such as MCI WorldCom that experiences significant customer churn. It is quite possible that some end users who were customers of MCI WorldCom at the time these contributions were collected, are no longer MCI WorldCom customers.

attempt to implement the Commission’s decision on remand retroactively. The Commission would have to ensure that any refund to Arya be passed through to customers who ultimately paid higher charges based on the previous allocation methodology. Once again, those same customers would likely face increased charges for other services in order to fund refunds to Arya and similarly situated carriers. There is no reason to engage in this pointless charade.

If the Commission does permit the Fifth Circuit decision to apply retroactively – which it should not – then the Commission should ensure that the administrative burdens associated with such a decision are minimized to the extent possible.

Retroactive application of the Fifth Circuit’s decision would allow two classes of carriers to claim a refund of “over-contributions” to the universal service funds: (1) carriers whose share of industry interstate revenues was lower than their share of total industry revenues, such as many incumbent LECs, CLECs, and wireless carriers; and (2) carriers that would now qualify for the international revenues exception. On the other hand, retroactive application of the Fifth Circuit decision would show carriers with a higher share of industry interstate revenues than of total industry revenues to have “underpaid.” Many, if not all, IXCs would fall into this category.

Retroactive application of the Fifth Circuit decision could create tremendous confusion and administrative burdens if all carriers who “overpaid” were to seek refunds from USAC and all carriers who “underpaid” were required to true-up their contributions to USAC. The carriers who “underpaid” would have to find hundreds of millions in additional USF contributions,

potentially on very short notice, and would have no realistic way of “back-billing” their customers.⁸

Even worse, the very large money flows necessary to “true-up” universal service contributions in this manner, and the associated confusion and administrative burdens, would serve little purpose. The Commission should recognize that the carriers who account for the bulk of any “overpayments” -- the ILECs -- simply passed through their overpayments in the form of higher access charges to IXCs -- who account for the bulk of the “underpayments” to USAC. From an ILEC perspective, retroactive implementation of the Fifth Circuit decision would have no net effect: they would receive a large refund from USAC that they would immediately have to refund to IXCs. From an IXC perspective, retroactive application of the Fifth Circuit decision would have almost no net effect: they would have to make large payments to USAC, but would receive almost equally large refunds from the ILECs. Moreover, it would be difficult to ensure that the timing of these refunds and recharges would occur in a manner that did not harm any party.

Retroactive implementation of the Fifth Circuit decision in a manner that shifts hundreds of millions of dollars among industry participants, when most industry participants would see no net effect or little net effect from these money flows, would not serve the public interest. The Commission should, instead, design a mechanism that is tailored to minimize the dollar flows and to direct funds among those parties for whom retroactive application of the Fifth Circuit decision would have some net effect. The Commission could consider the following approach:

⁸ Particularly since customers commonly change long-distance providers.

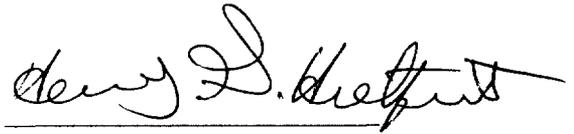
1. Recognizing that retroactive implementation of the Fifth Circuit decision would have no net effect on the ILECs, the Commission should (1) not permit ILECs to seek a refund; and, at the same time, (2) relieve the ILECs from their obligation to refund any overcharges to IXC.
2. All non-ILEC parties that may have over-contributed to the universal service programs should be required to file their claims with USAC by a specified date. The total claim amount should be relatively small, because the ILECs, who represented the bulk of the over-contributions, would not be eligible.
3. USAC should recover the claimed amount through the ordinary universal service assessment process, over a one-year period.⁹ Because the ordinary universal service assessment process collects contributions based on interstate revenues, nearly all of the claim amount would be recovered from those carriers, such as IXCs, who “under-contributed” during the period when universal service contributions were assessed based on total revenues.¹⁰ By using the existing universal service assessment process, the Commission would minimize the administrative burdens associated with retroactive implementation of the Fifth Circuit decision.

⁹ During the one-year period, one-quarter of the claim amount would be included in the computation of each quarterly assessment factor.

¹⁰ This method is not completely precise, in that a small portion of the claimed amount would be paid by ILECs or by parties receiving refunds from USAC. However, the cost of this imprecision is more than offset by the administrative benefits of using an existing and well-understood process to effect the retroactive implementation of the Fifth Circuit decision.

4. As the claimed amount is recovered through the quarterly universal service assessments, USAC would pay refunds in quarterly installments to parties that had made claims.

Respectfully submitted,
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April 24, 2000

CERTIFICATE OF SERVICE

I, Vivian Lee, do hereby certify that copies of the foregoing Opposition of MCI WorldCom, Inc. In the Matter of Federal-State Joint Board on Universal Service Access Charge Reform Petition for Reconsideration were sent via first class mail, postage paid, to the following on this 24th day of April 2000.

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